Supreme Court, U. S.
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No. 77-1093

In the Supreme Court of the United States

OCTOBER TERM, 1977

ERNEST MALIZIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

ROBERT J. ERICKSON,
JOHN VOORHEES,
Attorneys,
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Washington, D.C. 20530.

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OPINIONS BELOW

The court of appeals affirmed by judgment order (Pet. App. A). The opinion of the district court (Pet. App. B) is reported at 437 F. Supp. 952.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1978. The petition for a writ of certiorari was filed on February 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's federal prosecution violated the "dual prosecution" policy of the Department of Justice.

2. Whether the district court erred in denying petitioner's mid-trial motion to represent himself.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to distribute a controlled substance, in violation of 21 U.S.C. 812, 841(a)(1) and 841(b)(1)(A). On June 15, 1977, he was sentenced to fifteen years' imprisonment to be served consecutively to other sentences imposed prior to that date (Pet. App. B 3a).[1] The court of appeals affirmed without opinion (Pet. App. A).

On March 23, 1977, petitioner pled guilty to several narcotics charges contained in indictments returned by a New York state grand jury. Thereafter, on May 3, 1977, petitioner was convicted of the instant conspiracy to violate the federal narcotics laws, after a trial in which the government's evidence showed that petitioner was a member of a vast "heroin distribution network in the New York metropolitan area during 1973-74 * * * [and] was a middle-man in this massive conspiracy to distribute heroin in return for hundreds of thousands of dollars in cash" (Pet. App. B 3a-4a). On June 17, 1977, he filed a motion for a new trial, pursuant to Rule 33, Fed. R. Crim. P., alleging that the government violated its policy against successive federal prosecutions for acts forming the basis of a previous state conviction. The district court denied the motion after it was informed by the government that

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[1]In March 1974, petitioner was sentenced in the Southern District of New York to ten years' imprisonment for possession and distribution of cocaine. On May 24, 1977, he was sentenced in the Southern District of New York to a consecutive term of five years' imprisonment for escape from federal detention (Pet. App. B 3a n. 1).

On June 24, 1977, petitioner was sentenced by a New York State court to a term of six years' to life imprisonment to run concurrently with the sentences imposed by various federal courts.

the Attorney General and an Assistant Attorney General had retroactively authorized the prosecution on August 8, 1977 (Pet. App. B 6a).[2]

ARGUMENT

1. Almost two decades ago, the Department of Justice adopted a policy "of refusing to bring a federal prosecution following a state prosecution except when necessary to advance compelling interests of federal law enforcement." *Rinaldi* v. *United States,* No. 76-6194, decided November 7, 1977, slip op. 6.[3] Petitioner contends that the district court erred in refusing to grant his motion for a new trial because the government did not obtain authorization for his federal prosecution from Department officials until after he was convicted, and that, at the very least, he was entitled to a hearing in the district court on whether the government complied with its internal policy (Pet. 6).

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[2]We reproduce in an Appendix that *nunc pro tunc* authorization.

[3]This policy was first announced by Attorney General Rogers on April 6, 1959, in a memorandum to all United States Attorneys and a simultaneously-issued press release:

> After a state prosecution there should be no federal trial for the same act or acts unless the reasons are compelling. * * * [N]o federal case should be tried when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the Department. No such recommendation should be approved by the Assistant Attorney General in charge of the Division without having it first brought to my attention.

While the "*Petite* policy" (see *Petite* v. *United States,* 361 U.S. 529) has never been incorporated into specific guidelines or regulations, the Department has regularly brought it to the attention of the United States Attorneys.

But the *Petite* policy confers no enforceable right upon petitioner entitling him to have either the charges dismissed or a new trial. It simply involves the exercise of prosecutorial discretion in determining whether "to initiate, or to withhold prosecution for federal crimes" *Rinaldi* v. *United States, supra,* slip op. 5. There is, moreover, no basis for a claim that the petitioner has been prejudiced by the Department's delay in considering whether reprosecution was appropriate in the particular circumstances of his case. As *Petite* and *Rinaldi* illustrate, it is not too late, even after appeal, for the government to seek to vacate a conviction that violates the policy.[4] Here, the matter was considered, it was determined that "compelling" reasons justified the further federal prosecution, and a *nunc pro tunc* authorization was accordingly given. That is the end of the matter.

2. Petitioner next contends that the district court erred in denying his motion to represent himself.

a. It is first suggested that a pre-trial motion should be construed as a request by the petitioner to proceed *pro se.* For several reasons, we cannot so view it.

A few minutes before the trial was scheduled to begin (Pet. App. E 19a), Malizia gave his counsel copies of a motion to recuse the judge and dismiss his attorney (Pet. App. D 12a). But the grounds of the motion, set forth in an attached affidavit (Pet. App. D 13a-14a) and a brief (Pet. App. D 15a-17a), make it clear that petitioner was characterizing his court-appointed counsel as ineffective and tainted by his alleged participation in a plea bargain

[4]In *Rinaldi, supra,* slip op. 9, the Court said: "The defendant * * * should receive the benefit of the policy whenever its application is urged by the Government."

to the prejudice of his client (Pet. App. D 16a). That would naturally be read as a request for *new* counsel, not for self-representation.

Plainly, both court and counsel so understood the motion (see Pet. App. E 18a-22a; Pet. App. B 7a-9a). When it was denied, the trial began, and the defendant was not heard to say that he wished to proceed *pro se* until the *fourth* day (Tr. 512; Pet. App. B 8a). This suggests that petitioner himself did not then view his pre-trial motion as one for self-representation.

b. The mid-trial motion of course presents different considerations. At that point, the district court conducted an extensive hearing into petitioner's "background, education and employment experience (Tr. 546-47), [and] * * * found that [petitioner] was ignorant, offensive in manner and deportment and incapable of pursuing his own defense without severely prejudicing himself; that [petitioner's] conduct throughout the trial was deliberately disruptive; that the attempt to dismiss his counsel was merely a tactic to manipulate the record for purposes of appeal; that counsel was an able, resourceful and determined representative of [petitioner]. [Tr. 553-57]." (Pet. App. B 9a).

In view of these findings the court correctly held that "the prejudice to [petitioner's] interests which would have occurred if he were allowed to represent himself outweighed his *qualified right* so to do" (Pet. App. B 9a; emphasis in the original). See *Sapienza* v. *Vincent,* 534 F. 2d 1007, 1010 (C.A. 2); *United States ex rel. Maldonado* v. *Denno,* 348 F. 2d 12, 15 (C.A. 2), certiorari denied *sub nom. Di Blasi* v. *McMann,* 384 U.S. 1007. Moreover, the district court properly took cognizance of the likelihood that granting such a motion in the middle of trial would have disrupted the proceedings. Contrast *Faretta* v. *California,* 422 U.S. 806, 835-836. See, also, *id.* at 834-835 n. 46.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

ROBERT J. ERICKSON,
JOHN VOORHEES,
Attorneys.

MARCH 1978.

DOJ-1978-03

APPENDIX

August 8, 1977

Honorable Robert B. Fiske, Jr.
United States Attorney
Southern District of New York
New York, New York 10007

Attention: Mr. Federico Virella
Assistant United States Attorney

Re: *United States* v. *Ernest Malizia*

Dear Mr. Fiske:

This is to advise you that the Attorney General, the Honorable Griffin B. Bell, has approved your request for a *nunc pro tunc* waiver of the Department's dual prosecution policy in the case of *United States* v. *Ernest Malizia.*

Very truly yours,

Benjamin R. Civiletti
Assistant Attorney General
Criminal Division

By: _____
John C. Keeney
Acting Assistant Attorney General
Pursuant to 28 C.F.R. §0.133